

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DAVID FERGUSON, et al.	:	File No. C -1-02-039
	:	
Plaintiffs,	:	Judge Herman Weber
vs.	:	
RYDER AUTOMOTIVE CARRIER SERVICES, INC., et al.	:	DEFENDANTS' JOINT REPLY IN SUPPORT OF THEIR MOTION FOR AN ENTRY OF AN ORDER AMENDING THE SCHEDULING ORDER
Defendants	:	
	:	
	:	

The Defendants will not burden the Court by detailing the misstatements in the Plaintiffs' Objection and Answer to Defendants' Motion to Amend the Scheduling Order. Likewise, the Defendants will not correct every transparent attempt by the Plaintiffs to use concessions and statements by his employer in a workers' compensation case against the product liability Defendants in this case.

The Defendants' most important point is conceded by the Plaintiffs, namely that "the medical condition of Mr. Ferguson . . . is on-going and has always been on-going." Plaintiffs' Objection and Answer, Doc. 153 at 2. The Plaintiff's doctors – who also happen to be his expert witnesses – continue to treat his ever-changing condition. For example, previously surgical intervention was not recommended for Mr. Ferguson's condition. Exhibit A, Ferguson depo. at 11-12. But now, "we need to get him in to see a spine surgeon as soon as we can." Exhibit B, Follow Up Note of Dr. Simons dated July 17, 2003. Whether the change from not "a surgical candidate" to "see a spine surgeon as soon as we can" is regarded as newly discovered evidence or not, it is a material change that affects the Defendants' ability to respond to the accusations

leveled against them. The Plaintiffs' expert witness/doctors apparently feel that Mr. Ferguson's condition has changed since discovery closed and that his condition will improve with surgery. Therefore, the change in the Plaintiff's condition and further changes likely to result from his surgery will greatly affect his claim for pain and suffering, even if he doesn't work again. Perhaps most importantly, the fact remains that discovery for this case closed almost a year before the trial now set for May, 2004.

The Defendants do not seek to reopen all discovery. Rather, as indicated in Defendants' Joint Motion, the purpose of their request is to discern the nature and scope of Mr. Ferguson's new disc tear and address Mr. Ferguson's changing medical condition. As Mr. Ferguson's doctors/experts continue to treat him, the testimony they will provide at trial will change. The Defendants should be permitted to keep abreast of those changes. Likewise, the Plaintiffs have expressed interest and concern in certain defense witnesses and a reopening of discovery will afford the opportunity to depose them.

The Plaintiffs do not articulate any actual prejudice from giving the Defendants updated medical discovery. Logically, only if Mr. Ferguson's condition is improving can the Plaintiffs show any prejudice. But, if that is the case, prejudice to the Defendants and the fact finding mission of the jury could not be more clear. The Plaintiffs nevertheless insist that the Defendants proceed to trial with stale evidence and without accounting for continuing medical developments that include a proposed surgery that may greatly improve Mr. Ferguson's condition.

Lastly, because it illustrates the flaws in the Plaintiffs' argument, one factual contention by the Plaintiffs does require comment. On page 7 of its Answer and Objection, the Plaintiffs claim that the Defendants knew about damage to the L4-L5 position of the Mr. Ferguson's spine

from his medical records, and attach "Exhibit 7" as proof of this fact. However, that exhibit is dated July 10, 2003 - well after the June 9, 2003 deadline for the Defendants to designate their experts. The MRI that exhibit references was taken after the close of discovery, is not in the Defendant's possession, and the Plaintiffs refuse to release it. It is the same MRI that Dr. Simons cites in his notes indicating that Mr. Ferguson needs to see a surgeon. See Exhibit B.

Obviously, as the Plaintiffs concede, Mr. Ferguson's on-going condition is in a state of flux. Given the unusually long lag time between the close of discovery and the start of trial in this case, as well as Mr. Ferguson's changing condition, updated discovery is warranted and the Defendants' Joint Motion for an Entry Amending the Scheduling Order should be granted.

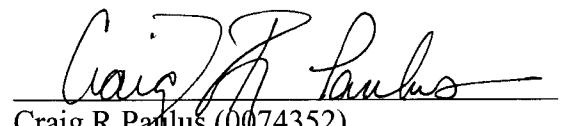
Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been sent electronically through the Court's ECF/CMS system to the following on this 5th day of December, 2003:

January, 2004.

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EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

DAVID FERGUSON, et al., :
:
:
Plaintiffs, :
vs. : Case No. C-1-02 039
: (Judge Herman J. Weber)
RYDER SYSTEM, INC., et :
al., :
:
Defendants. :

Deposition of DAVID EDWARD FERGUSON,
plaintiff herein, called by the defendants for
cross-examination, pursuant to the Federal Rules of
Civil Procedure, taken before me, Wendy L. Welsh, a
Registered Diplomat Reporter and Notary Public in
and for the State of Ohio, at the offices of Kohnen
& Patton, 1400 Carew Tower, Cincinnati, Ohio, on
Thursday, November 21, 2002, at 1:18 a.m.

	Page 10		Page 12
about	1 A. It's related to the pain control.	1 repeat the surgery. And I told him that surgery was	
works may	2 Q. How effective is the regimen that you're	2 not an option for me, that I'd like to try the pain	
ns that	3 under now as far as pain management is concerned?	3 management so I could go back to work. And that's	
told you	4 A. The new regimen I'm under, it is better.	4 what me and him agreed on and that's when I started	
o long,	5 It's considerably better than what it was before I	5 the pain management.	
back and	6 went on it, but I still have a lot of pain.		
e I think	7 Q. I take it that your pain levels ebb and	6 Q. Have you been back to Dr. Roberts since	
12	8 flow a little bit based upon the level of activity	7 you started on the pain management protocol?	
13	9 that you do, would that be correct? Get worse and	8 A. No, sir, I haven't. No, sir.	
14	10 get better depending on how much you're moving	9 Q. But I understand correctly that although	
15	11 around?	10 the pain management regime you're under now is an	
16	12 A. Well, no, sir. Usually the level of pain	11 improvement over what you had you're still not to	
17	13 is more consistent with the medication, what time I	12 the level where you think you can go back to work as	
18	14 take what medication. If I take the morphine,	13 a car hauler?	
19	15 naturally I'm going to have a better morning than I	14 A. I couldn't do the heavy car hauling,	
20	16 have a night.	15 lifting, no, sir, I couldn't, I don't believe, I	
21	17 Q. So as the medicine starts to wear off is	16 couldn't --	
22	18 when you start to feel a little bit more sensitivity	17 Q. How about driving a truck, but not being	
23	19 to the pain?	18 involved with the cargo, is that something that you	
24	20 A. Sure.	19 would be suited for at this point?	
21	21 Q. Just as we're sitting here today during	20 A. That part, sir, I don't know. I would	
22	22 the previous deposition and this one, on a scale of	21 have -- I can't sit for no four or five hours	
23	23 one to ten how would you rate your pain?	22 without having to get up, nothing like that.	
24	24 A. Five to six.	23 Q. Have you discussed that possibility with	
		24 Dr. Simons or any of the other doctors about other	
	Page 11		Page 13
ription	1 Q. And where is the pain located?	1 types of work that you might be able to do provided	
ee	2 A. Lower lumbar region.	2 you could stand up and stretch and that sort of	
me of the	3 Q. Are you having any problems into either	3 thing?	
extensiv	4 leg?	4 A. The only thing I've discussed with them,	
	5 A. My left leg, it goes numb on me.	5 sir, is the fact that I want to go back to work at	
i, which	6 Q. Is there any pain there or is it just the	6 my job at Allied hauling cars to get my time in with	
and then	7 numbness?	7 the Teamsters.	
on I take	8 A. Just the numbness.	8 Q. By getting your time in, to get to your	
bout 3:00	9 Q. I think I saw in your records a few	9 retirement level?	
, which if	10 occasions where you had actually fallen because of	10 A. Yes, sir.	
anti-seizur	11 some numbness in your leg.	11 Q. How much more do you need to do that?	
'o hours	12 A. My leg, I -- on several occasions I've	12 A. I need six years.	
,	13 lost the use of my leg. I fell and broke my right	13 Q. Do you currently have a Workers'	
	14 toe on my right foot, my big toe on my right foot.	14 Compensation claim pending, or has that been	
	15 And I put a gash in my left leg on the second	15 resolved?	
	16 occasion it happened.	16 A. I'm -- they give me a check each -- well,	
	17 Q. Due to falls?	17 they haven't gave me a check in a while, but they	
	18 A. Yes, sir.	18 were giving me a check.	
; it	19 Q. Have any of your treating doctors	19 Q. Okay.	
i because	20 indicated that you would benefit from surgery?	20 A. But I haven't received anything in a	
hat relat	21 A. Dr. Roberts told me that I wasn't a	21 while.	
	22 candidate at the time, that he would like to try the	22 Q. Has there been any final disposition	
	23 pain management because he told me that the type of	23 insofar as a permanent rating on your back or	
	24 surgery he would do I would be back within a year to	24 anything like that?	

EXHIBIT B

FERGUSON, DAVID
7/17/03

FOLLOW-UP DR. SIMONS

Mr. Ferguson is here for follow-up. He continues to have trouble with pain in his back and leg and actually it has gotten worse lately. The MRI shows actually a tear in his disc and that is something we need to address because obviously it is due to the sciatica problem and the sprain/strain situation that is all work related. This trouble with the radicular symptoms and work related condition needs to be treated with 2 more epidural steroid injections, which we will of course guide fluoroscopically and also there are some facet nerves involved again that need to be addressed and this will help control his pain. In the meantime we need to get him in to see a spine surgeon as soon as we can. We are going to increase his Kadian to 50 mgs. a day and change his Norco over to Actiq sticks, which will be at 400 micgs. We will get a kidney and liver profile to check his blood chemistry to make sure everything is going okay there and make sure there are no adverse effects from the work related medications. We will see him back for follow-up in a month and hopefully by then we have the epidural authorized and done. He understands the risks of steroid use and the epidurals as well.
Mitchell E. Simons, M.D./ns